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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE OF TELEMUNDO GROUP, INC. IN SUPPORT OF APPELLEES

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BRIEF AMICUS CURIAE OF TELEMUNDO GROUP, INC. IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Telemundo Group, Inc. ("Telemundo"),[1] the second largest Spanish-language television company in the United States, produces and broadcasts programming for the Nation's large and growing Hispanic population. Through its owned and operated broadcast stations and affiliates ("the stations"), Telemundo serves 53 television markets that include approximately 85 per cent of all Hispanic households in the United States. Tele-

[1] This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

mundo and its stations thus serve as a vital link to this community by providing Hispanic citizens with a wide variety of programming in their native language, including national and international news, talk shows, movies, novelas (Spanish-language soap operas), game and variety shows, music, and sporting events. Programming is provided by Telemundo through its network, and by the local stations. Without this programming, many Hispanic citizens would be deprived entirely of a principal source of information, news, and entertainment.

Telemundo and its viewers have been greatly affected both by the "must-carry" provisions of Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1471 (codified at 47 U.S.C. § 534), and by the specific harms that Section 4 was intended to rectify. Despite significant Hispanic populations in the areas served by Telemundo's stations, cable operators in those areas have historically excluded the signals of those stations from their cable systems, and many of those systems carried no Spanish-language programming whatsoever. Consequently, before implementation of the must-carry provisions, Spanish-speaking cable subscribers in much of the Nation received little or no programming in their native language.

Under Section 4, however, Telemundo's stations qualify as licensed local commercial broadcast television stations, and therefore have the right to request carriage of their signals on most cable systems in their market areas. *See* 47 U.S.C. § 534(a), (b), (h). Because Section 4 requires those systems to carry the signals of a certain number of qualified local broadcasters, many operators that previously refused to carry the signals of Telemundo's stations have begun carrying those signals to comply with the must-carry provisions. Telemundo's preliminary data shows that since the effective date of those provisions, the broadcasts of Telemundo's full power owned and operated and affiliated stations have been added to approximately 140 additional cable systems nationwide, thereby reaching an additional 400,000 Hispanic viewers. It has also been Telemundo's experience that the number of Hispanic subscribers to a cable system rises whenever Telemundo is added to that system, thereby increasing Telemundo's audience even more.

Telemundo and its viewers thus have a strong interest in this case, and Telemundo urges the Court to uphold Section 4 and effectuate Congress' intent to provide a "fair, efficient, and equitable distribution of broadcast services" that "promote[s] the availability to the public of a diversity of views and information * * *." 1992 Cable Act § 2(a)(9), (b)(1), 106 Stat. 1461, 1463. As set forth below, Telemundo believes its own experience demonstrates the importance of these goals and the legitimacy of the manner in which Congress has sought to achieve them.

SUMMARY OF ARGUMENT

Congress enacted Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 to rectify specific monopolistic and anti-competitive practices that Congress found were inherent in the cable industry. Telemundo believes that the District Court correctly held that this remedial legislation is entirely consistent with the First Amendment, and supports the legal arguments made by appellees below. Rather than repeating those arguments here, Telemundo has filed this brief to apprise the Court of the particular harm that the cable industry's anti-competitive practices have inflicted upon its own stations and upon the Nation's Spanish-speaking television audience, and to stress the vital importance of Section 4 to that important but historically under-served population.

Telemundo believes its own experience will help underscore for the Court two important reasons why Section 4—far from violating the First Amendment—is in fact a

measured and appropriate response to a glaring market imbalance that severely restricted the public's access to a wide range of diverse information. First, Telemundo's stations—which necessarily serve a discrete minority of viewers within their market areas—have been particularly disadvantaged by the "bottleneck" nature of the cable delivery system and the absence of competition within the cable industry. In seeking to rectify these structural barriers to access, Congress in no way dictated the content of any cable programming, but merely sought to level a playing field that had long been skewed against local broadcasters. And second, Telemundo's experience demonstrates the importance of the must-carry provisions to viewers—like Telemundo's Spanish-speaking audience—whose informational needs have been historically underserved due to the cable industry's monopolistic and anti-competitive practices.

ARGUMENT

I. THE MUST-CARRY PROVISIONS ARE A NEEDED REMEDY FOR MARKET IMBALANCES AND ANTI-COMPETITIVE PRACTICES THAT HAVE LONG HARMED LOCAL BROADCAST STATIONS

The must-carry provisions are a content-neutral remedy for specific market imbalances and anti-competitive practices within the cable industry that Congress found resulted in the systematic exclusion of local broadcasters from cable systems. As the District Court correctly found, these provisions are "economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." J.S. App. 13a. As explained below, this remedial legislation is of special importance to Telemundo, which has been particularly harmed by the competitive imbalance that Section 4 was intended to rectify.

Telemundo's own experience demonstrates the importance of the must-carry provisions to smaller broadcasters

that serve discrete local populations—like Telemundo's Spanish-speaking viewers—whose informational needs have long been ignored as the result of the monopolistic structure of the cable industry and the "bottleneck" nature of its delivery system. Because the programming on Telemundo's stations is necessarily directed at the minority of the Nation's population that understands Spanish, cable operators within those markets have strong incentives to exclude Telemundo's signals and instead carry English-language programming on the limited number of available cable channels. And as Congress expressly found, these operators also have strong incentives to carry programming in which they have a financial interest, and to deny carriage to local broadcasters—like Telemundo's stations—that compete with the cable industry for advertising revenues. *See* 1992 Cable Act § 2(a)(5), (15), 106 Stat. 1460, 1462.

Thus, as noted above, the Nation's cable operators largely excluded Telemundo's signals prior to the advent of the must-carry provisions, and this exclusion persisted even in areas with substantial Hispanic populations. For example, in two recent cases arising in California, cable operators filed suit—on the same grounds alleged here—in an attempt to continue excluding the signals of Telemundo's stations. One case, *Community Cablevision Co.* v. *FCC*, No. CV 93-3104 R (C.D. Cal.), involved a cable system serving Orange County, near Los Angeles.[2] Prior to the effective date of the must-carry provisions, that system excluded the signals of a Telemundo station (Station KVEA) notwithstanding that KVEA is viewed in an average month by 71 per cent of the Hispanic population in the Los Angeles area (which has the Nation's largest concentration of Hispanics), and notwithstanding that nearly 10 per cent of the system's subscribers are His-

[2] The factual information in this brief relating to the *Community Cablevision* case is set forth in the Declaration of Karen A. Harmon, filed in that case on June 10, 1993.

panic. In fact, the system at issue in *Community Cablevision* carried neither of the two most popular Spanish-language stations in the Los Angeles area. As a result of Section 4, however, this system has begun carrying KVEA.

Similarly, *Viacom International, Inc.* v. *FCC*, No. C-93-1984 EFL (N.D. Cal.), involved a cable operator in the San Francisco area, which has the Nation's fourth largest concentration of Hispanics.[5] The cable systems at issue in that case had historically excluded the signals of another Telemundo station (station KSTS), but began carrying those signals as a result of Section 4. And despite the fact that 15 per cent of the cable subscribers in the San Francisco area are Hispanic, this operator carried KSTS on only one of its eleven cable systems in the area prior to the advent of must-carry.

As Congress expressly found, the must-carry provisions are of considerable importance to the financial viability of smaller local broadcasters such as Telemundo, whose signals have long been unfairly excluded from cable systems. *See* 1992 Cable Act § 2(a)(16), 106 Stat. 1462 (Congress found that without must-carry "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized"). Indeed, the advertising revenues of station KVEA will increase by an estimated $100,000 per year simply as the result of KVEA's addition to the system at issue in *Community Cablevision*; and the advertising revenues of station KSTS would increase by an estimated $350,000 per year as the result of its addition to Viacom's San Francisco area systems. Moreover, because of the cable medium's ever-growing dominance, it is becoming increasingly difficult for smaller broadcasters like Telemundo's stations to remain profitable without access to the cable market.

[5] The factual information in this brief relating to the *Viacom* case is set forth in the Declaration of Joe Cruz, filed in that case on June 11, 1993.

These increased advertising revenue figures demonstrate that cable operators have long ignored a substantial demand for Spanish-language programming, and underscore Congress' findings that these operators, if left unregulated, will fail to meet the informational needs of substantial segments of their local viewing audience. As the District Court explained, Section 4 was based on Congress' belief that the "unfavorable treatment of broadcasters is the result of the cable operators' attempts to obtain a competitive advantage, not a function of consumer demand." J.S. App. 25a. Telemundo's own experience strongly supports that finding.

The problems that Telemundo and other broadcasters have experienced in gaining access to cable systems show that Section 4 is a remedial provision that must be evaluated in the same light as other content-neutral forms of economic regulation that may incidentally affect speech.[6] Similarly, the systematic exclusion of broadcasters—like Telemundo's stations—that serve discrete minority populations demonstrates that the cable medium, like the over-the-air broadcast medium, suffers from a scarcity of outlets for available programming. As Judge Sporkin explained below, "while cable has virtually eliminated the problems caused by scarcity on the broadcast spectrum, it has created another scarcity—namely access to the channels on cable systems themselves." J.S. App. 40a. The must-carry provisions are plainly a legitimate legislative response to that problem. *Cf. Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (applying scarcity rationale to uphold content-based broadcast regulation). Regardless whether it might be physically possible for

[6] *See, e.g., FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802 (1978) (sustaining restrictions on newspapers' ownership of broadcast stations as "a reasonable means of promoting the public interest in diversified mass communications"); *Associated Press* v. *United States*, 326 U.S. 1, 19-20 (1945) (rational basis standard applied to uphold antitrust remedy directed at news organization).

competing cable systems to accommodate all available programming. Congress has found that cable systems are in fact natural "bottleneck" monopolies that systematically exclude local broadcasters. Telemundo therefore urges the Court to uphold the intent of Congress and allow broadcasters like Telemundo the access to cable systems that has been unfairly denied them.

II. THE MUST-CARRY PROVISIONS FURTHER THE FIRST AMENDMENT RIGHTS OF TELEMUNDO'S SPANISH-SPEAKING VIEWERS, WHOSE INFORMATIONAL NEEDS HAVE LONG BEEN UNMET BY THE CABLE INDUSTRY

As this Court has emphasized, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390.[5] The must-carry provisions further this important interest by allowing viewers to receive the diversity of local programming—without regard to the content of that programming—that had long been denied them as a result of the cable industry's monopolistic structure. The importance of this goal is even more clear in the case of Telemundo's Spanish-speaking viewers, who have been adversely affected by the anti-competitive practices of cable operators in ways that other viewers have not.

As noted above, many cable systems—even those located in areas with substantial Hispanic populations—carried no Spanish-language programming prior to the effective date of the must-carry provisions. This exclusion has been especially harmful to Spanish-speaking viewers. Denying these viewers access to the broadcasts of Telemundo's stations does not merely exclude one choice among many viewing options, but rather denies them one

[5] *See also First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

of the very few outlets for television programming in their native language. Without this programming, which has now been ensured for many viewers through Section 4, an important link will be severed between the Nation's Hispanic citizens and society at large. And this harm would not be felt merely by cable subscribers. As Congress recognized, the increasing dominance of cable threatens the financial viability of those stations that are denied access; thus, even Hispanic viewers who do not subscribe to cable may find no programming in their native language if the must-carry provisions are not enforced.

Accordingly, far from establishing content-based distinctions warranting "strict scrutiny" under the First Amendment, the must-carry provisions help ensure that cable viewers receive a wide spectrum of programming that has been systematically denied them as a result of the anti-competitive nature of the cable industry. Section 4 in no way attempts to dictate the particular content of appellants' speech. Rather, in order to rectify a serious market imbalance, Congress created a right of access for an entire category of broadcasters that Congress specifically found were adversely affected by that imbalance. This category was defined without any reference to the content of those broadcasters' programming, and the local broadcasters who benefit from Section 4 are as diverse as the viewers they serve. In Telemundo's case, Section 4 has provided Hispanic viewers throughout the Nation with much-needed access to a variety of programming in their native language. Other broadcasters that benefit from Section 4 serve different audiences with different programming.

Without must-carry, Spanish-speaking viewers will be deprived of a vital source of information due solely to the anti-competitive practices and market imperfections of the cable industry. But with must-carry, these viewers will be able to access a wide range of information in their native language. It is precisely this type of diversity in

local programming—without regard to the content of that programming—that Congress intended to foster by redressing the structural impediments blocking local broadcasters' access to cable. *See* 1992 Cable Act § 2(b)(1), 106 Stat. 1463 (Act was intended to "promote the availability to the public of a diversity of views and information * * *"). That diversity should be encouraged, not stifled.

CONCLUSION

For the foregoing reasons and those in the appellees' briefs, the judgment of the District Court should be affirmed.

Respectfully submitted,

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